November 18, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:

Date of Filing: August 29, 2005

Case Number: TFA-0118

On August 29, 2005, XXXXX filed an Appeal from a determination issued to him on July 21, 2005, by the Richland Operations Office (Richland) of the Department of Energy (OR) in response to a request for documents that XXXXX submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that Richland release any responsive material to XXXXX.

I. Background

In a FOIA request, XXXXX sought "all notes, papers, records of phone calls, interview records, e-mails, investigative reports and/or complaints pertaining to the late April or early May complaints filed by Dr. Thomas Fogwell" against XXXXX with the Richland Employee Concerns Program. Letter from Richland to XXXXX (July 21, 2005) (Determination Letter). Richland responded that it could neither confirm nor deny the existence of records responsive to the request. An agency's statement in response to a FOIA request that it can neither confirm nor deny the existence of records is commonly called a "Glomar" response, referring to the first instance in which a federal court upheld the adequacy of such a response. *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (agency responded to a request for documents pertaining to a ship named the "Hughes Glomar Explorer" by neither confirming nor denying the existence of any such documents). Richland went on to state that without the consent of Dr. Fogwell, "even to acknowledge the existence of records would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA." *Id.* XXXXX then appealed the determination. If this Appeal were granted, Richland would be required to release the requested information, if it exists.

II. Analysis

Exemption 6 shields from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co*., 456 U.S. 595, 599 (1982). Further, the term "similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." *Washington Post*, 456 U.S. at 602. Accordingly, Richland neither confirmed nor denied the existence of any records responsive to XXXXX's request because without the consent of Dr. Fogwell, "even to acknowledge the existence of records would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA." Determination at 1.

A Glomar response is justified when the confirmation of the existence of certain records would itself reveal exempt information. *William H. Payne*, 26 DOE ¶ 80,161 (1997) (quoting *Antonelli v. F.B.I.*, 721 F.2d 615 (7th Cir. 1983)). If the responsive material existed, it would fall within the purview of the types of files exempt from disclosure under Exemption 6. However, if Richland withholds these records, it would be an acknowledgment that the material exists. Thus, Richland properly applied the Glomar response. The danger of disclosing such information is accurately described in *Payne*:

> "Lacking evidence of an individual's consent, an official acknowledgment of an investigation by the agency, or an overriding public interest in the information, even to acknowledge the existence of such records pertaining to any named individual could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Payne, 26 DOE at 80,696 (1997).

Richland stated that in invoking Exemption 6, it considered: 1) whether a significant privacy interest would be invaded by disclosure of information, 2) whether release of the information would further the public interest by shedding light on the operations or activities of the government, and 3) whether in balancing the private interest against the public interest, disclosure would constitute a clearly unwarranted invasion of privacy. Electronic mail message from Dorothy Riehle, Richland, to Valerie Vance Adeyeye, OHA (September 21, 2005). According to Richland, the release of such information, if it exists, would not contribute significantly to the public's understanding of Richland's operations and does not outweigh Dr. Fogwell's privacy interests.

XXXXX argues that releasing the information is in the public interest because it would allow him to effectively conduct contractor oversight and determine whether the contractor serves the best interest of the taxpayer. We disagree and find that release of this information, if it exists, is of minimal public interest and is clearly outweighed by the privacy interest of Dr. Fogwell.

In conclusion, we find that Richland was justified in providing a Glomar response to the FOIA request because the confirmation of the existence of such records would itself reveal exempt information. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Kevin XXXXX on August 29, 2005, OHA Case Number TFA-0118, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 18, 2005